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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1964

188

ROBERT G. REGAN CO., a corporation,
Respondent,

vs.

CAESAR A. FIOCCHI and CHARLES FIOCCHI, co-partners, d/b/a Caesar Fiocchi Company, and SEABOARD SURETY COMPANY, a corporation,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

KENNETH S LEWIS,
Suite 1734
7 South Dearborn Street
Chicago, Illinois,
Attorney for Petitioners.

LOWELL B. KOMIE,
WILLIAM LEVINSON,
Suite 2110
77 W. Washington Street
Chicago, Illinois
Of Counsel.

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3-7
Federal Questions	8
Reasons For Granting Writ	9-11
Conclusion	11

INDEX TO APPENDICES

Appendix A—

Statutes 1a

Appendix B—

Opinion of Appellate Court of Illinois, 2nd District 2a

CITATIONS.

Wilson v. United States, 221 U.S. 361, 31 S. Ct. 538, 55 L. Ed 771 (1911) 9, 10, 11

People v. Ryan, 410 Ill. 486, 103 N.E. 2d 116, (1952) .. 10

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Caesar A. Fiocchi and Charles Fiocchi, co-partners doing business as Caesar Fiocchi Company, and Seaboard Surety Company, a corporation, pray that a writ of certiorari issue to review a judgment of the Supreme Court of Illinois entered in the above entitled case on March 16, 1964, denying petitioners leave to appeal to the Supreme Court of Illinois from a judgment of the Appellate Court of Illinois, 2nd district, entered on December 6, 1963.

CITATIONS TO OPINION BELOW

The opinion of the Appellate Court of Illinois, 2nd district, is reported in 44 Ill. App. 2d 336, 194 N. E. 2d 665 (1963). There was no opinion in the Supreme Court of Illinois.

JURISDICTION

The judgment of the Appellate Court of Illinois, 2nd district, was entered on December 6, 1963. The opinion is printed in Appendix B accompanying this Petition. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Illinois erred in denying petitioners leave to appeal on March 16, 1964, from a judgment of the Appellate Court of Illinois, 2nd district, entered on December 6, 1963, affirming a directed verdict and judgment of the Circuit Court of Lake County, Illinois, in favor of respondent and against petitioners in the amount of $11,295.15 entered on June 26, 1962.

2. It is respectfully submitted that error was committed by the trial judge in directing a verdict against petitioners and denying their motion for new trial filed July 26, 1962 (Abstract of Record—Pages 14, 15 and 16). The basis alleged for error is that the trial judge denied petitioners access to certain records of the Federal Housing Authority that they had subpoenaed for use at the trial by way of subpoena duces tecum.

THE STATUTES INVOLVED

The statutes involved are Amendment XIV, Sect. 1, Constitution of the United States (due process); Ch. 110, Ill. Rev. Stat. Sec. 62 (subpoenas). Both the foregoing are printed in Appendix A, *infra*.

STATEMENT OF THE CASE

Respondent, Robert G. Regan Co., a general contractor in the construction industry, filed suit against Caesar A. Fiocchi and Charles Fiocchi, co-partners, doing business as Caesar Fiocchi Company in the Circuit Court of Lake County at Waukegan, Illinois on December 22, 1960. The Fiocchi brothers conducted a mason contracting business as co-partners in Highland Park, Illinois and were joined as partners in the suit along with their surety, Seaboard Surety Company, who had written the performance bond under the construction contract made the subject of the action.

Robert G. Regan Co. brought a two count complaint against the Fiocchis and their surety, Seaboard Surety Company, alleging failure to perform a masonry subcontract for the brick work on certain residences constructed by Robert G. Regan Co. at the Glenview Naval Air Station, Glenview, Illinois. The specific failure of performance alleged was a material deviation in installing wall ties binding the veneer to the framing of the buildings as called for by the specifications (Abstract of Record, pages 1-5). It was alleged that the brick work was buckling on the buildings.

The Fiocchi brothers and Seaboard Surety Company in their answer admitted the deviation in the placement of the wall ties but alleged that the breach was trivial and not related to the damage that had arisen to the buildings (Ab-

stract of Record, pages 6-8). It was alleged in the answer that the falling away or buckling condition of the brick work arose through the fault of Robert G. Regan Co., it being the theory of petitioners that the real cause of damage to the buildings arose through both improper design and the use of inferior lumber setting up a shrinking force that pulled away the veneer.

The case came to trial before a jury in June of 1962. After Respondent had put on his case, Petitioners' counsel opened his defense by calling the president of Respondent Company as an adverse witness. After hearing testimony from only this witness the trial judge directed Petitioners to make an offer of proof, which offer of proof was denied and the jury was directed to return a verdict and judgment in favor of Respondent. This directed verdict and judgment was entered against Petitioners and in favor of Respondent in the amount of $11,296.15 on June 26, 1962. (Abstract of Record, pages 12-13).

Prior to the commencement of the trial, Petitioners and Respondent also it is believed caused to be served upon the Federal Housing Authority certain subpoenas. Petitioners' subpoena is set both in form and substance below:

No. 74417

CIRCUIT COURT LAKE COUNTY, ILLINOIS

Robert G. Regan Co., a corporation vs. Caesar A. Fiocchi, et al

Subpoena Duces Tecum

Serve Federal Housing Authority at 36 South Wabash Avenue, Chicago 3, Illinois

State of Illinois, Lake County—ss.

The People of the State of Illinois to the Sheriff of said County—Greeting: We Command You to Summon Federal Housing Authority, by its duly authorized agent and keeper of records if he shall be found in your County, personally to be and appear before the Circuit Court of said County, on the 25th day of June 1962, at the Court House in Waukegan at the hour of 9:30 a.m., and to bring with him and produce at the time and place aforesaid, to be used as evidence, certain instruments of writing purporting to be all records, correspondence, photographs, reports, writings, and documents pertaining to construction of a Wherry Housing Development under Title VIII of the National Housing Act as amended, known as FHA Project No. 071-80009 then and there to testify, and the truth to speak, concerning all and singular those things of which he may have knowledge, or the said instruments of writing doth import of, and concerning a certain suit now pending and undetermined in the said Circuit Court, wherein Robert G. Regan Co., a corporation plaintiff and Caesar A. Fiocchi and Charles Fiocchi, co-partners, d/b/a Caesar Fiocchi Company, and Seaboard Surety Co., a corporation defendants, to testify on the part of the said Caesar A. Fiocchi et al. And this he shall in no wise omit under penalty of what the law directs; and have you then and there this writ,

with an indorsement thereon in what manner you shall have executed the same.

Seal.

Witness Stephanie Sulthin, Clerk of said Circuit Court, and the seal thereof at Waukegan, Illinois this 21st day of June A.D., 1962, Stephanie Sulthin, Clerk

I, Lowell B. Komie, having been first duly sworn upon my oath state that on the 21st day of June, 1962, at the hours of 3:00 P.M., I served the Federal Housing Authority at 36 South Wabash Avenue, Chicago 3, Illinois, by handing a copy of this Subpoena Duces Tecum to Joseph Lyons, agent.

/s/ Lowell B. Komie

Seal.

In putting on its case, Respondent called one Erich Olsen as a witness. Olsen testified that he was the FHA inspector on the job and had refused to give it final certification due to the faulty condition of the veneer work. The contract between the owner and Robert G. Regan Co. required acceptance by FHA before final payment to the general contractor. The FHA inspector also testified that in his opinion the condition causing the veneer to come loose resulted from the Petitioners' failure to properly install wall ties as provided by the specifications.

It is Petitioners' belief that Inspector Olsen appeared on behalf of Respondent in answer to a subpoena served upon him or the Federal Housing Authority by Respondent. In any event, he was the only official of FHA who appeared at the trial and it was Petitioners' belief that he or some other official of FHA would also be present at the trial to produce the records requested by Petitioners' Subpoena Duces Tecum at such time that Petitioners com-

menced their defense. The documents requested in the Subpoena Duces Tecum were necessary to Petitioners defense to determine whether the decision reached by Inspector Olsen as testified to by him in behalf of Respondent was in any manner fraudulent, unreasonable or arbitrary. Petitioners had no intention of calling Inspector Olsen as a witness but merely sought to inspect his file on the project and to use such documents as might be relevant to impeach his conclusion through the testimony of Petitioners' own expert witnesses.

In the short interval that passed subsequent to the testimony of Inspector Olsen as a witness for Respondent and prior to the commencement of Petitioners' defense, Petitioners contacted the Chicago office of FHA and renewed their request that the documents made the subject of their Subpoena Duces Tecum be produced at once. Petitioners were told that the documents would be produced but that they were in a warehouse and some difficulty was being incurred in locating them. Whereupon, on June 26, 1962, Petitioners were required to commence their defense at bar without recourse to the documents subpoenaed and were almost immediately after the commencement of their defense ordered by the trial judge to make an offer of proof, said offer thereupon being denied and the jury directed to bring forth a verdict and judgment against Petitioners. At no time during the trial were the documents requested in Petitioners' Subpoena Duces Tecum produced by the Federal Housing Authority nor was cause shown for their non-production or objection made to the subpoena itself.

On July 26, 1962 Petitioners filed their Motion for New Trial and raised therein as an allegation of error the failure of FHA to produce the subpoenaed documents (Abstract of

Record, pages 14 and 15, para. 6). The trial court denied the Motion for New Trial (Abstract of Record, page 16).

Appeal was perfected by Petitioners to the Appellate Court of Illinois, 2nd District and on December 6, 1963 the Appellate Court entered an order affirming the judgment of the Circuit Court of Lake County (Abstract of Record, page 53). In its opinion, which is set forth in Appendix B, *infra*, the Court commented on the fact that Petitioners made no attempt to show that the FHA decision was unreasonable, arbitrary or fraudulent and consequently were bound by the decision and determination of FHA.

On December 30, 1963 the Appellate Court of Illinois, 2nd District, denied Petition for Rehearing (Abstract of Record, page 53).

On March 16, 1964, the Supreme Court of Illinois denied Petition for Leave to Appeal.

FEDERAL QUESTIONS

It is alleged that the failure of the Federal Housing Authority to produce records and documents specified in the Subpoena Duces Tecum served upon its agent in Chicago, Illinois on June 21, 1962 by Petitioners for production and delivery to the trial court has resulted in a deprivation of Petitioners' property without due process of law (Constitution of the United States, Amendment XIV, Sec. 1, Appendix A). It is also respectfully submitted that in denying Petitioners access to these records and documents the Circuit Court of Lake County, Illinois, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision (Rules of the Supreme Court of the United States, Rule 19, 1(b)).

The stage of the proceeding at bar at which the alleged Federal question was first raised by Petitioners was upon the filing of their Motion for New Trial in the Trial Court on July 26, 1962 (Abstract of Record, pages 14 and 15, para. 6). The trial court denied the Motion for New Trial (Abstract of Record, page 16). The Motion for New Trial thereupon was abstracted and the error preserved in the record before the Appellate Court, 2nd District and Supreme Court of Illinois (Abstract of Record, pages 14 and 15, para. 6). The alleged constitutional deprivation and resultant federal question were further specifically raised and argued in Petition for Rehearing before the Appellate Court of Illinois, 2nd District (pages 3 and 4). Petition for Rehearing was denied by the Appellate Court of Illinois, 2nd District on December 30, 1963 (Abstract of Record, page 53).

REASONS FOR GRANTING THE WRIT

It is clear that under Illinois law, Petitioners as a matter of right had authority to cause a Subpoena Duces Tecum to be issued from the Circuit Court of Lake County, Illinois for service upon the Federal Housing Authority in Chicago for production of those documents and records Petitioners believed relevant to their presentation of an orderly defense. Ch. 110 Ill. Rev. Stat., Sec. 62 (Appendix A). It is also evident from the language of this section of the Illinois Civil Practice Act that Petitioners were not required to obtain an order of court prior to issuance by the clerk of the Subpoena Duces Tecum.

In *Wilson* v. *United States*, 221 U.S. 361, 31 S. Ct. 538, 55 L. Ed. 771, (1911) a president of a private corporation refused to produce certain corporate records before a New York City Grand Jury in response to its Subpoena Duces

Tecum. He was committed by the New York Circuit Court for contempt and on appeal to the Supreme Court of the United States, the judgment of the Circuit Court was affirmed. Mr. Justice Hughes delivered the opinion of the Court and had occasion to discuss therein the traditional use of the writ of subpoena duces tecum, saying at 221 U.S. 361, 372:

> ". . . The power to compel the production of documents is, of course, not limited to those cases where it is sought merely to supplement or aid the testimony of the person required to produce them. The production may be enforced independently of his testimony, and it was held long since that the writ of subpoena duces tecum was adequate for this purpose . . . The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of common law, which receives and acts upon both descriptions of evidence and could not possibly proceed with due effect without them. . . ."

The statement of Mr. Justice Hughes that the right to production of written testimony is essential to the existence of a Court of law indicates that the Petitioners right to issuance and return of their subpoena duces tecum is a basic procedural right and therefore would be protected under the Fourteenth Amendment of the Constitution of the United States (Amendment XIV, Sec. 1, U. S. Constitution, Appendix A). Both *Wilson* v. *United States* and *People* v. *Ryan*, 410 Ill. 486, 103 N.E. 2d 116 (1951), a case also involving the refusal of a corporate officer to produce documents requested by a subpoena duces tecum issued by a grand jury, illustrate that the right to production of written testimony by subpoena duces tecum is so basic to the orderly procedural administration of our courts that failure to comply with the writ will be punishable by contempt.

Wilson v. *United States*, also indicates that it is not necessary under a subpoena duces tecum that the person returning the writ be sworn as a witness and his oral testimony taken. The writ of subpoena duces tecum is regarded as an order for the production of documents and these must be produced by a respondent to the writ regardless of whether his testimony is to be taken orally. Therefore, Petitioners had a right to production of the documents and records requested in their writ regardless of whether they intended to call FHA inspector Olsen as a witness. If, they intended to use the documents and reports to be introduced through the testimony of their own expert witnesses to impeach Inspector Olsen, this was their right.

The Appellate Court of Illinois, 2nd District, in its opinion at 44 Ill. App. 2d 336, 194 N.E. 2d 665 (1963) emphasized that petitioner made no attempt to show Inspector Olsen's decision to be unreasonable, arbitrary or fraudulent and therefore held that they were bound by the decision in absence of any showing to the contrary.

At 194 N. E. 2d 665, 668, it is said, Appendix B, *infra*:

> ". . . Defendants made no attempt to show that the FHA's decision or determination that the wall ties should have been installed in accordance with the specifications was unreasonable, arbitrary or fraudulent, nor even any attempt to explain why the wall ties were not so installed in the first place. Consequently defendants were bound by the decision and determination of FHA that the brick would have to be taken down, the wall ties put in according to specifications, and the brick relaid . . ."

It is respectfully submitted that had the Federal Housing Authority complied with Petitioners' subpoena *duces tecum*, Petitioner would have had an opportunity to

explain why the decision of Inspector Olsen blaming them for the damage to the buildings was unreasonable, arbitrary or fraudulent. Without recourse to FHA's records relating to the project, petitioners would have little basis to lay the foundation for impeachment of Inspector Olsen's previous testimony.

CONCLUSION.

For the foregoing reason the writ of certiorari should be granted.

Respectfully submitted,

KENNETH S LEWIS
Suite 1734
7 S. Dearborn St.
Chicago, Illinois
Attorney for Petitioner

Lowell B. Komie
William Levinson
Suite 2120,
77 W. Washington St.
Chicago 2, Illinois
Of Counsel

APPENDIX A

Amendment XIV, Sect. 1, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ch. 110, Ill. Rev. Stat. Sect. 62 (subpoenas):

> "The clerk of any court in which an action is pending shall, from time to time, issue subpoenas for those witnesses and to those counties in the State as may be required by either party. Every clerk who shall refuse so to do shall be fined, at the discretion of the court, in any sum not to exceed $100. An order of court is not required to obtain the issuance by the clerk of a subpoena duces tecum. For good cause shown, the court on motion may quash or modify any subpoena or in the case of a subpoena duces tecum, condition the denial of the motion upon payment in advance by the person in whose behalf the subpoena is issued of the reasonable expense of producing any item therein specified."

APPENDIX B

Opinion of the Appellate Court.

McNEAL, *J.*—

The plaintiff, Robert G. Regan Co., was the general contractor for the construction of certain buildings for Glenview Naval Homes, Inc. Plaintiff entered into a subcontract with the defendants, Caesar A. Fiocchi and Charles Fiocchi, to do all masonry work in accordance with the plans and specifications of the contract. Plaintiff sued defendants for their failure and neglect to conform strictly with such plans and specifications, and also sued the Seaboard Surety Company as surety for the faithful performance of the subcontract. At the close of plaintiff's evidence, the Circuit Court of Lake County denied certain offers of proof by defendants, and then directed the jury to return a verdict against defendants for $11,296.15. The court entered judgment on the directed verdict, and defendants appealed.

The general contract was for construction of a number of buildings at the Glenview Naval Air Station, known as the Johnson Court-Wherry Housing Development. The project was financed by FHA insured financing under Title VIII of the National Housing Act, as amended, and known as FHA Project No. 07180009. On November 21, 1955, the defendant partners made a subcontract with the plaintiff corporation to perform all masonry work under the prime contract per plans and specifications for $113,000. A portion of the prime contract relating to masonry construction of exterior walls provided:

> "Brick veneer facing on wood frames shall be at least 3½ inches thick, laid on running bond except where stacked bond is shown, and securely attached to the structure with corrosion resistant ties spaced not farther apart than 16 inches vertically and 16 inches horizontally."

The subcontract referred to the plans and specifications and recited that the subcontractor had examined them and knew the contents thereof. By the subcontract defendants agreed to conform strictly with all the terms and conditions of the plans and specifications in the performance of the subcontract, and agreed to replace, upon demand of contractor and at subcontractor's expense, with proper materials, any materials determined by contractor or owner to be unsatisfactoy within one year from the date of final completion of the prime contract and the final inspection and approval of FHA. Subcontractor also agreed to indemnify and save the contractor harmless from any and all claims, damages or liabilities of whatever nature which might result from performance of the subcontract, and agreed that in the event of the subcontractor's default in the performance of the subcontract in any respect as required by contractor, the contractor might perform the work and furnish materials therefor, or might have other parties do the same, and the subcontractor agreed to pay any excess in cost over the subcontract agreed price for completion by the contractor. The subcontractor also guaranteed to remove and remedy any defects arising within one year of the completion of the project, and agreed that payment should not constitute acceptance of any improper work or performance.

The subcontractor also agreed to comply with all regulations and requirements of the FHA. Among these requirements were provisions that the FHA shall have the right to interpret the contract documents and to determine compliance therewith; that all items of constructions shall be subject to final acceptance by the FHA; and that the contractor shall acceptably correct any defects due to faulty materials or workmanship which appear within a period of one year following substantial completion.

The subcontractor was paid in full upon the first inspection by FHA, but within the one-year period the inspector determined that the wall ties were not attached as required by the specifications and the brick walls on many of the buildings constructed by defendants commenced to

bulge. The inspector notified the owner, Glenview Naval Homes, to correct the condition by installing ties according to specifications. Thereupon the owner called upon plaintiff to correct the condition and in turn plaintiff directed the defendant subcontractor to install the ties.

It was admitted in defendants' answer and established by the evidence that defendants did not comply with the provision of the prime contract requiring brick veneer to be securely attached to the structure with corrosion resistant ties spaced not farther apart than 16 inches vertically and 16 inches horizontally. According to the evidence, on many building the wall ties were 4 foot on center instead of 16 inches, and there was no place on any of the 16 buildings where wall ties were found to be in place 16 inches vertically and horizontally.

It was stipulated that the FHA inspector prepared a report after his inspection of the work and sent the report to Glenview Naval Homes, Inc., that in the report the inspector stated that the brick would have to be taken down and the ties would have to be put in according to specifications and the brick put back up to satisfy the FHA on the project, and that the report was forwarded by Glenview Naval Homes, Inc. to the plaintiff and subsequently by the plaintiff to the defendants. It was further stipulated that a series of letters went from the plaintiff to the defendants notifying them of the absence of wall ties, demanding that defendants do the work, stating that the owner and Glenview Naval Homes demanded that the ties be installed, and notifying defendants that if they did not do the work plaintiff would be forced to do the work itself, and in that event plaintiff would charge defendants for the expense entailed in so doing; that the demand made was to take off the brick, install the ties and put the brick back up; and that all this was done prior to the commencement of any work by the plaintiff company.

Defendants refused to remove the bricks and remedy the omission of wall ties. Thereafter plaintiff removed the brick, installed the ties to the satisfaction of the FHA and replaced the brick. According to uncontradicted evi-

dence in the record it cost plaintiff $11,296.15 to remedy defendants' faulty work. Defendants refused to pay for this additional expense and plaintiff commenced this action.

During the trial counsel for defendants made an offer to prove by one of the defendants that he estimated the cost of taking the buckled brick off, placing wall ties 16 inches on center, and rebricking where brick had been removed, at $6000. Defendants' counsel also offered to prove by an architectural engineer and a contractor that in their opinions the walls would have bulged whether the provisions of the contract as to wall ties had been strictly complied with or not. Objections to these offers of proof on the grounds that the estimate and opinions were immaterial were sustained, and the offers denied. Defendants offered no further evidence and the court directed a verdict for the amount of the judgment entered against them. Defendants' motion for a new trial was denied, and this appeal followed.

Contractors have no right to depart from working plans made a part of the contract. If they do so, it is at their peril, and they became guarantors as to the strength and safety of the structures. The parties were clearly entitled to contract to have the buildings erected in accordance with certain plans and specifications. An express contract admits of no departure from its terms, and the sub-contractors could discharge themselves from liability only by constructing the buildings in accordance with the plans and specifications, unless a deviation was mutually agreed upon. *Clark et al.* v. *Pope et al*, 70 Ill. 128, 132. Where the parties to a building contract agree that an architect shall pass upon the work and certify as to the payments to be made, his decision is binding and can only be attacked for fraud or evident mistake. *Hennessy* v. *Metzger*, 152 Ill. 505, 515. When a sub-contract provides that the commissioner of public works is to decide all questions as to the proper performance of the work, the determination of the commissioner is binding on the sub-contractor and can only be avoided by showing that the commissioner

acted unreasonably, arbitrarily or fraudulently, and the onus of showing such facts is upon the sub-contractor. *Brownell Imp. Co.* v. *Critchfield*, 197 Ill. 61, 71.

In the instant case defendants agreed to conform strictly with all terms and conditions of the plans and specifications in the performance of the subcontract, and to comply with the FHA's regulations and requirements, including the FHA's interpretation of contract documents and determination of compliance therewith, and including a provision that all items of construction were subject to final acceptance by FHA. Defendants made no attempt to show that the FHA's decision or determination that the wall ties should have been installed in accordance with the specifications was unreasonable, arbitrary or fraudulent, nor even any attempt to explain why the wall ties were not so installed in the first place. Consequently defendants were bound by the decision and determination of the FHA that the brick would have to be taken down, the wall ties put in according to specifications, and the brick relaid.

Under the authorities cited above this contract admitted of no departure from its terms, and defendants were able to discharge their liability only by constructing the buildings strictly in accordance with the terms and conditions of the plans and specifications. Whether or not one of the defendants estimated that the cost of removing the brick, installing the wall ties in accordance with specifications, and replacing the brick as required by FHA, would amount to $6000 instead of $11,296.15, was entirely immaterial. Likewise, opinions that the walls would have bulged even though the wall ties had been installed or that the walls were stronger without the ties, were also wholly immaterial. Here the contract required strict conformance with a specification that the brick veneer be securely attached to the main structure with corrosion resistant ties installed 16 inches apart. When defendants departed from this specification they did so at their peril, and all attempted excuses for non-compliance became im-

material. The trial court properly denied defendants offers of proof.

Defendants' deviations from the specification were not with plaintiff's consent. On the contrary, the record is replete with requests and demands for compliance with the specification and replacement of the faulty work. Although not abstracted, the record includes photographs showing that the brick veneer in many places bulged about two inches away from the main structures. Innumerable invoices, payrolls and other exhibits are included in the record and show in detail the amounts expended by plaintiff to comply with FHA requirements relative to the wall ties specified. The trial judge limited such amounts to necessary expenses and carefully eliminated items of profit and overhead expense.

In our opinion the judgment of the Circuit Court of Lake County must be, and the same is hereby affirmed.

AFFIRMED.

DOVE, *J.*, Concurs